

Clerk
District Court

OCT 24 2005

For The Northern Mariana Islands
By _____
(Deputy Clerk)

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**UNITED STATES DISTRICT COURT
NORTHERN MARIANA ISLANDS**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAI, Xiao Jun

Defendant.

Criminal Case No. 05-00022

**DEFENDANT'S REPLY
BRIEF IN SUPPORT OF
MOTION TO SUPPRESS**

Hearing Date: November 10, 2005
Time: 9 am

Defendant Dai, Xiao Jun, through counsel Robert T. Torres, hereby sets forth his reply in support of his Motion to Suppress and in response to the Government's Opposition to Defendant's Motion to Suppress. For the reasons set forth below and in addition to Defendant's memorandum in support of his motion, the motion to suppress should be granted.

ORIGINAL

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1 Inasmuch as the Government claims Defendant has not indicated
2 what evidence he wishes to suppress, Defendant must oblige and assist the
3 Government: all evidence obtained from the illegal entry into Defendant's
4 apartment on June 29, 2005. This includes all evidence obtained after the
5 illegal entry; all evidence obtained pursuant to the search warrant as this
6 evidence was a product of the fruit of the poisonous tree to wit: an illegal
7 search and seizure.
8

9
10 **THE MOTION TO SUPPRESS IS TIMELY AND PERMISSIBLE**

11 The Motion to Suppress is timely and was not restricted to filing
12 before August 12, 2005. The Government's minor argument on this point
13 illustrates that its assertions are not well-taken. On August 11th the parties
14 entered into a stipulation requesting a hearing on a waiver of Defendant's
15 right to a speedy trial. In that stipulation the stated reasons were, among
16 others, "to allow Defendant to further assist counsel in preparation of the
17 case, including reviewing additional discovery and considering pretrial
18 motions."
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20
21 The Court's Minute Order, to which the Government did not object,
22 specifically states that upon the knowing waiver, the matter would be reset
23 and "the deadlines for pretrial motions . . . shall also be amended." *See,*

1 Stipulation and Minute Order by Judge Munson dated August 11th.

2 In its order granting the waiver, the Court found that the ends of
3 justice would be served in allowing the defense further time to review the
4 evidence in preparation for trial. No other deadlines were set as to pretrial
5 motions. One week before trial (which is on December 12th) the parties
6 would file pretrial exhibits and jury instructions, among other things.
7

8 Noting the provisions of Local Rule 12.1, therefore, the parties
9 contemplated and agreed that good cause, to wit: more time for defense
10 counsel to prepare, warranted resetting the trial date and previously
11 established deadlines. The Court recognized this and allowed such in its
12 order.
13

14 Moreover, the Government now reveals one new fact which was
15 never disclosed to the Court or Defendant, (including the Complaint, in the
16 Report of Investigation by Agent Goward, and in the Affidavit in support of
17 the search warrant) that the government supposedly used an electronic
18 tracking. *See*, Opposition to Motion to Suppress at Page 4. At the very
19 least this is sandbagging the Court and Defendant, and requires compliance
20 with the discovery rules governing criminal cases to be fair.
21
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23

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1 **THE GOVERNMENT'S ARGUMENT THAT THE MOTION SHOULD BE**
2 **DENIED FOR LACK OF MERIT IS SPECIOUS AND MUST BE REJECTED. THE**
3 **AGENTS CREATED THE EXIGENT CIRCUMSTANCES AND THE ELECTRONIC**
4 **TRACKING DEVICE DID NOT LEAD THEM TO MR. DAI'S APARTMENT.**

5 The Government argues that the motion to suppress must be denied
6 because, as it states in conclusory fashion, the agents had probable cause to
7 enter and search Mr. Dai's apartment B-3 based on exigent circumstances to
8 prevent the destruction of evidence. This argument is not an argument. It is
9 a mere conclusion.

10 The Government goes further to claim that Mr. Dai does not dispute
11 that the agents had probable cause to search Mr. Dai's apartment if they had
12 secured an anticipatory search warrant. *See* Opposition at Page 7. This
13 assertion is both incorrect and flawed in logic. Mr. Dai's argument is that if
14 the agents had sufficient time to secure an electronic monitoring device (as
15 they now claim for the first time) then they had time to secure a search
16 warrant. They didn't. Mr. Dai's argument is that if the Court had reviewed
17 the agents' application for an anticipatory warrant and if they had
18 established the areas and scope of the warrant, they may have had sufficient
19 probable cause to secure a warrant. They didn't and they never had a
20 warrant.
21 warrant.

22 But because the agents were either negligent or too sloppy to do so
23

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1 (apply for and secure a warrant), they had no warrant so that the search and
2 seizure remains what it is: a warrantless occasion. The only exception is
3 the claim of exigent circumstances. Yet the agents created the exigent
4 circumstances when they lost Mr. Dai. They abandoned their covert
5 surveillance and searched for Mr. Dai. It remains a fact that there was no
6 warrant which allowed entry into Mr. Dai's apartment much less a search.
7 There was no probable cause which led the agents to Mr. Dai's door.

8
9 Somehow the Government would have this Court overlook such
10 salient facts and conclude, summarily, that Defendant's motion is without
11 merit. In contrast, the body of case law cited by Defendant establishes that
12 the facts in Mr. Dai's case compel a suppression order for the kind of
13 conduct prohibited by the Fourth Amendment and by the CNMI
14 Constitution protecting places where a person has a legitimate expectation
15 of privacy^{1/}.

16
17 The Government now reveals, for the first time, that it used an
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19 ¹ In this motion Defendant is well aware of the body of case law which
20 establishes that the use of an electronic monitoring device does not violate the Fourth
21 Amendment. *See, U.S. v. Most*, 789 F.2d 1411, 1414 (9th Cir. 1986) and *United States v.*
22 *Karo*, 468 U.S. 705, 711 (1984). What is salient here is that it was not the tracking or
23 monitoring device which alerted agents to Mr. Dai's apartment. Rather, they were
unaware of the location of the package and this created an exigent circumstance of their
own making. Agent Goward claimed the exigent circumstance as the basis for his
warrantless entry despite the fact that neither he nor his fellow agents saw Mr. Dai enter
the apartment. Now they use the electronic tracking device as the basis for the exigent
circumstances to wit: that the package was opened.

1 electronic device which "tracked the package to a limited degree and also to
2 determine when and if the package had been opened." Opposition Brief at
3 4. What is most noteworthy is that the Prosecutor is making statements or
4 assertions without any declarations and which are unsupported by any
5 declaration or statement of any agent including that of Special Agent
6 Goward. The Government is playing "hide the ball" and this is not
7 amusing.
8

9 The agents clearly followed Mr. Dai and saw him enter the Liao Ti
10 Tour Agency. The problem is that Mr. Dai was not within the travel
11 agency. They lost him. For how long? No one knows. The gap in their
12 surveillance caused them to become agitated and hostile. The tracking
13 device did not lead them to Mr. Dai's apartment. Indeed, the agents
14 abandoned their covert surveillance and created an exigent circumstance on
15 their own. Then they accost a "woman" (unidentified) who the agents
16 claim led them to Mr. Dai's apartment. As set forth in support of his
17 motion, the woman, Ms. Huang, gave a sworn declaration directly contrary
18 to the agents' assertions. The woman, Ms. Huang, did not see Mr. Dai enter
19 his apartment. She only knew the general direction of where Mr. Dai lived.
20 See, Declaration of Ms. Huang.
21

22 As to the agents, all they claim is that the agents recognized Mr. Dai's
23

1 shoes outside the apartment door. Shoes. This is what the Government
2 asserts in its opposition brief. Shoes alone do not establish probable cause.
3 As to the electronic transmitter, there is no statement or claim that the
4 device was tracked to the location inside the apartment. Once again, Mr.
5 Dai is left to guess as to the agents' actions or knowledge, in the absence of
6 discovery on these important facts, relating to an illegal search and seizure.
7

8
9 **THE MOTION TO SUPPRESS MUST BE GRANTED**

10 The motion to suppress is timely. Further, the Government is
11 withholding relevant discovery information, such as the information on the
12 tracking device, as some sort of a game with Defendant.
13

14 The Government, in its opposition, makes factual allegations
15 unsupported by any statement by Agent Goward or any other agent. They
16 are mere conclusions by the Prosecutor. For example, having lost the object
17 of their surveillance when he entered the tour agency, the Government now
18 claims that Mr. Dai knew he was being followed "causing him to take an
19 evasive path to his apartment." Opposition at Page 8. No agent ever makes
20 that assertion. Again, that assertion is of no moment and amounts to mere
21 conjecture. Moreover, it does not establish probable cause when no one
22 saw Mr. Dai enter the apartment much less the apartment complex.
23

1 Also, the Government does not and cannot deny Mr. Dai's statement
2 regarding the overly broad protective sweep by TFA Albert Palacios, among
3 other things. All it points to are tablets in plain view in Mr. Dai's bedroom
4 after their forced entry without probable cause. That evidence should be
5 suppressed. Further, merely seeing Viagra tablets in a bedroom during a
6 protective sweep does not allow an agent to expand that security sweep into
7 closed containers within a freezer. That evidence should also be
8 suppressed.
9

10 What happened on June 29th was a "search now and get the warrant
11 later approach." The justifications offered by the Government and the new
12 revelations regarding the electronic tracking device are mere after-the-fact
13 justification for a defective and overly broad search and seizure in violation
14 of Mr. Dai's Fourth Amendment rights.
15

16 For the foregoing reasons the Government's argument must be
17 rejected and the motion to suppress must be granted.
18
19

20 Respectfully submitted this 24th day of October, 2005
21

22 

23 ROBERT T. TORRES, F0197
Attorney for Defendant.